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Supreme Court of the United States

OCTOBER TERM, 1938

MRS. ZILLAH LYON, *Petitioner*,

v. No. 189

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, *Respondent*.

STATEMENT, BRIEF AND ARGUMENT FOR PETITIONER

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STATEMENT OF THE CASE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows to this Honorable Court that on the 31st day of October, 1936, petitioner commenced an action in the Circuit Court of Benton County in the State of Arkansas to recover on a policy of insurance in which she is named beneficiary issued by the above-named Mutual Benefit Health and Accident Association, hereafter called respondent, by the terms of which it insured petitioner's husband, Wm. R. Lyon, against loss of life from accidental causes. The respondent by appropriate action removed the cause of action into the District Court of the United States for the Western District of Arkansas, and thereafter petitioner filed an amended com-

plaint to which respondent filed a general demurrer. The general demurrer was overruled. Verdict was directed in favor of plaintiff and judgment duly entered thereon, from which plaintiff appealed. The Circuit Court of Appeals revered the judgment of the District Court.

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked under the provisions of Sec. 240 (a) of the Judicial Code as amended by the Act of Feb. 13, 1925, Sec. 347 (a), Title 28 U. S. Code.

The plaintiff is a citizen of the State of Arkansas and the defendant is an insurance corporation domiciled in the State of Nebraska. The amount involved is $3,678, exclusive of interest.

The judgment of the Court of Appeals reversing the judgment of the District Court was entered March 19, 1938. Motion for rehearing was filed April 1, 1938. Judgment overruling motion for rehearing was entered April 11, 1938 (R. 69 to 71).

Petition for Writ of Certiorari to review the judgment of the Circuit Court of Appeals was filed in this Court on 8th day of July, 1938, and the petition was granted on the 10th day of October, 1938.

STATEMENT OF THE MATTERS INVOLVED

The policy sued upon was issued on the 31st day of December, 1926, and recites the following consideration, which is found in clause "C" on page 3 of the policy, to-wit:

> "The copy of the application endorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the insured in the application and the payment in advance of $74 the first year."

In this clause is also set forth the terms upon which the policy may thereafter be kept in continuous effect, as follows:

> " * * * and the payment in advance of premiums of $64 annually or $16 quarterly thereafter, beginning with April 1, 1927, is required to keep the policy in continuous effect."

This clause also contains provisions governing premium payments as follows:

> "If any such dues are unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the date such premium is due.
>
> "The acceptance of any premium on this policy shall be optional with the Association and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required."

Clause "D" contains the following provision, which apparently conflicts with other provisions:

> "The term of this policy begins at twelve o'clock noon standard time on date of issue against accident

and on the thirty-first day after date of issue against disease and ends at twelve o'clock noon on date any renewal is due."

The death benefit payable without increase is $2,000, but Part "C" on the first page of the policy and the rider on the third page provide for attractive increases in benefits as follows:

> "Part 'C': 'After the first year's premium has been paid, each year's renewal of this policy shall add $200 to the death benefit until same amounts to $4,000. When twenty full annual premiums have been paid the death benefit of $4,000 as herein provided may be continued in force thereafter at a yearly cost of $4 without medical examination.' "

The rider on page 3 provides:

> "In event of the accidental death of the insured under the provisions of this policy providing the policy has been in force for one year the Company agrees to pay in addition to the amount otherwise payable an amount equal to all the premiums paid by the insured on the policy plus compound interest at the rate of 4% per annum from the date of the payment of each of said premiums to the death of the insured" (R. 25).

The policy provides for the payment of the premiums at the home office of the Association in the city of Omaha, Nebraska, but prior to the time this policy was issued the Association had appointed one J. T. Cottingham as its local treasurer stationed at the city of Rogers in the State of Arkansas with authority to solicit insurance, collect premiums and deliver policies (R. 26).

In the application the following question and answer appear in line 16 on page 4 of the policy (R. 25).

"What is the premium? $16.00 quarterly."

The proof shows conclusively that every quarterly premium paid was in the sum of $16. The premium for the first year being the sum of $74, if paid in equal quarterly installments the sums paid would necessarily have been $18.50.

The receipt issued for the first quarterly payment was countersigned by the local treasurer for the Association and contains the following material recital:

> "The Mutual Benefit Health and Accident Association in consideration of the payment of the premium due and subject to provisions of the policy held by insured and the statements and answers in the application signed by the insured, which the insured by the acceptance of this receipt repeats and declares to be true and agrees shall be the basis of his contract of insurance, does hereby continue in force the said policy from date hereof until twelve o'clock noon standard time July 1, 1927, at which time the next quarterly premium will be due. Yours truly, C. C. Criss. Countersigned this 25th day of March, 1927.
>
> "By: J. T. Cottingham, Local Treasurer" (R. 27).

Each subsequent receipt contains identical recitals excepting date and each was signed by Roy E. Hamilton, Local Treasurer, except the last one, which is signed by Harold R. Parker, Local Treasurer. The material recitals read as follows:

> "The payment of this premium receipted for if made on or before date due keeps your policy in continuous effect and if paid after date due reinstates the policy on date of this receipt as provided in policy until twelve o'clock noon standard time October 1,

1927, at which time another payment will be due" (R. 29-37 to 43).

At the trial the testimony showed that all premiums due on the policy had been paid and receipted for excepting the premium due on the 1st day of July, 1934 (R. 28).

The Association prior to July 1, 1927, appointed one Roy E. Hamilton to succeed Mr. Cottingham as its local treasurer at the said city of Rogers, who collected each and every premium due from the insured prior to the 1st day of April, 1934. The Association without notice to the insured changed its method of collecting premiums and required that same be paid to its local treasurer in the city of Little Rock, Arkansas. The petitioner, who acted as agent for the insured in the payment of all premiums, had been accustomed to make payment at the office of the local treasurer for a period of more than seven years and the local treasurer gave express consent to the payment of premiums out of time and on numerous occasions received payments of premiums after date same were due and payable (R. 28 and receipts R. 29-37 to 43).

When the premium came due on the 1st day of April, 1934, petitioner appeared at the local treasurer's office to make the payment. He was absent, but a girl child was present in the office who informed petitioner that the local treasurer was absent and suggested that the premium would have to be sent to Little Rock, Arkansas, and gave petitioner the name of the person to whom it could be sent but gave petitioner no information or intimation that Mr. Hamilton was no longer the local treasurer authorized to collect premiums. Petitioner sent the quarterly premium to

Little Rock and received a receipt for same but no notice that future premiums should be sent to Little Rock was given her (R. 29).

When the premium came due on the 1st day of July, 1934, petitioner appeared at the office of the local treasurer to pay the premium, but the office was closed and the local treasurer absent. Petitioner immediately set about to locate the local treasurer, but was unable to do so until the fifth day of the month at which time she found the local treasurer at his office and tendered him the premium. The local treasurer refused to receive the premium, saying: "Didn't you receive notice?" Petitioner replied that she had not received any notice. Then the local treasurer advised petitioner that the premium would have to be sent to Little Rock. Petitioner sent the premium to Little Rock by postal money order, but same was refused on the ground that payment was tendered out of time (R. 30).

The petitioner was the only witness in the trial. She identified the policy sued upon and same was introduced and received in evidence. She testified that all requirements of the policy had been met, and this is undisputed, except the matter of payment of premium for the first year in advance (R. 24).

Petitioner testified on direct examination that when the application for the insurance was made she was present; that the application was sent in to the company, and the policy was later delivered to the insured; that the premium for the first year in the sum of $74 was paid in advance at the time the policy was delivered; that she per-

sonally paid a part of the first year's premium, and her husband paid the balance (R. 24-27).

On cross-examination by counsel for respondent, petitioner testified as follows:

"That the policy was purchased in Rogers, Arkansas; Mr. J. T. Cottingham took the application; he is now dead; that she paid a premium of $74 for the first year, but did not get a receipt for the same; that Mr. Cottingham said the policy was a receipt. She made her next premium on the 1st of April, 1927. The policy was obtained on the 31st day of December, 1926.

"Q. Why was it, if you know, that you paid a quarterly premium on the 1st day of April, 1927, or just three months after you said that you had paid a premium for the entire year?

"A. Well, in order to keep my premiums up—because Mr. Cottingham said there was no days of grace included in the policy, but if we paid a year's premium in advance that would take the place of these days of grace" (R. 43).

After all the testimony was in, counsel for the defendant presented to the Court an oral motion to strike that part of petitioner's testimony relating to the payment of the first year's premium, as follows:

"Mr. Pryor: If the Court please, at this time we desire to move to strike the testimony of Mrs. Lyon regarding her testimony to the effect that she paid $74 at the time this policy was applied for on the ground that it is not pleaded in the complaint and is not an issue that is raised by the pleadings in this Court" (R. 44-45).

The Court overruled the motion to strike and commented as follows:

"The Court: The motion will be overruled. The Court is of the opinion that the testimony is admissible. Her reason for the payment of this was brought out by the defendant's counsel. In the next place the Court is of the opinion that this question is raised and that he overruled the demurrer on the ground that she had paid—the allegation that she had paid the policy up past the date of July 1, 1934. This question was raised on demurrer. The Court at that time thought it was sufficiently alleged, and I still think it is sufficiently alleged, to cover that point. So your motion will be overruled and you may have your exception" (R. 45).

The material allegations of the complaint bearing on the question of payment of the premiums are as follows:

"That on December 31, 1926, the defendant issued and delivered to Wm. R. Lyon, plaintiff's deceased husband, a policy of life insurance, by the terms of which said defendant for and in consideration of the sum of $74 premium for the first year *paid in advance* and the sum of $64 annually thereafter payable in *quarterly* installments of $16 each in advance, *beginning on the 1st day of April, 1927.*" (Emphasis supplied)

"That on the 19th day of July, 1934, while said policy was in full force and effect, the said Wm. R. Lyon lost his life by accidental causes; that notwithstanding all dues and premiums *had been paid* on said policy and the insured and plaintiff had fully performed the conditions and re-

quirements of said policy and made due demand for payment, defendant has failed and now refuses to pay the sum due thereon. (Emphasis supplied)

"That the insured paid all premiums due thereon in the sum of $464 and an additional sum of $48; that the defendant was without right to claim or declare a forfeiture of said policy for nonpayment of said premium on said 1st day of July for the following reasons, to-wit:

"Third: That said premium had been previously paid and therefore was not due and payable on said 1st day of July, and the insured was not liable for payment of same at said time" (R. 12-13).

Counsel for respondent declining to offer any evidence, moved the Court to direct a verdict in favor of respondent as follows:

"That the policy terminated by its own terms on the 1st day of July, 1934, and that the defendant herein, as shown by the policy and as the evidence discloses, had the option to reject the premium payment and exercised that option; and on the further ground that the premium receipts, themselves, show that the policy terminated on the 1st day of July, 1934, prior to the time this loss occurred" (R. 47).

The motion was overruled. The Court upon its own motion directed the jury to return a verdict in favor of the plaintiff in the sum of $3,678, and judgment was duly entered, to which action the defendant excepted and by appropriate steps appealed to the United States Circuit Court of Appeals for the 8th Circuit (R. 47).

Defendant's assignments of error material in the consideration of the case here are that the Court erred in overruling the defendant's demurrer to the complaint; in overruling the defendant's motion to strike testimony of the plaintiff with reference to the payment of the first year's premium in advance; in overruling the defendant's motion for an instructed verdict; in directing a verdict for the plaintiff (R. 49 to 53).

ABSTRACT OF CONCLUSIONS OF COURT OF APPEALS

The Circuit Court of Appeals held:

1. That the testimony of Mrs. Lyon tended to change and extend the insurance contract sued upon and therefore her testimony is incompetent (R. 65).

2. That the meaning of the words of the policy taken in connection with the application for the policy is that the insurance was payable in advance and that the rate was $74 per annum for the first year and $64 per annum thereafter; that the insured elected to pay for the insurance in payments of $16 per quarter and that the date, April 1st, 1927, written into the form was the date upon which the first paid-up term expired and that the terms of the policy are a direct limitation upon the authority of any soliciting agent to bind the company by oral conversations outside of the written terms of the policy and application (R. 66).

3. The declaration of the application that the premium for the policy was $16 quarterly taken with the provision of the clause (C) that payment of $16 quarterly beginning April 1st, 1927, was required to keep the policy in effect, manifest the intent of the parties to contract for insurance on the quarterly payment plan (R. 66-67).

4. That the policy evidenced a contract of term insurance which the Association had a right to discontinue at any date when renewal was due.

5. That the term of insurance was ended prior to the accident (R. 67).

The findings and conclusions and reversal of the judgment amount to hold that petitioner cannot recover on the policy, and the trial court erred in directing a verdict for petitioner.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1st. In holding that the testimony of Mrs. Lyon relating to the payment of $74 for the first year in advance is incompetent and therefore inadmissible.

2nd. In holding that the action of the local treasurer in collecting the $74 for the first year in advance and consenting to premium payments out of time was in excess of his authority and therefore not binding on respondent.

3rd. In holding that under the terms of the contract the first year's premium was to be paid in quarterly installments of $16.

4th. In holding that the policy contract is one of term insurance which respondent could lawfully discontinue at any premium paying date and therefore petitioner cannot recover on the contract.

5th. In holding that the District Court erred in directing a verdict for plaintiff, and in reversing the judgment of the District Court.

BRIEF AND ARGUMENT

Specification of Error No. 1

The Court of Appeals in holding the testimony of Mrs. Lyon incompetent upon the ground that it tended to change and extend the terms of the contract, in effect set up a new defense for respondent, one that was neither pleaded nor otherwise urged by respondent in either the trial court or the Court of Appeals.

If respondent desired to challenge competency of the testimony it was duty bound to object on specific grounds and thus afford the trial court opportunity to rule on the objection and to assign that ruling as error. This was not done, therefore respondent waived its right to challenge the testimony upon the ground that it tended to change and extend the contract.

Board of Com'rs of Kearney, Kan., v. *Irvin*, 126 Fed. 689.

Kruse v. *Snyder*, 87 Fed. (2nd) 723.

Lewis v. *Standard Oil Co.*, 88 Fed. (2nd) 512.

Garrett v. *Pope Motor Co.*, 168 Fed. 905.

Atlas Distilling Co. v. *Rhenstrom*, 86 Fed. 224.

Gallot v. *U. S.*, 87 Fed. 446.

The rule that has been given general application is that, excepting cases showing extraordinary reasons for relaxation, there must be specific objection affording opportunity for the trial court to pass upon the question, an exception to the ruling, and the ruling must be assigned as error.

The exceptions to the rule are where the error complained of is patent on the record or there was an attempt to save an exception.

The rule is explained and applied in the following decisions of this court:

Brasfield v. *U. S.*, 272 U. S. 448.

U. S. v. *Atkinson*, 297 U. S. 157.

N. Y. Central Ry. Co. v. *Edward H. Johnson*, 279 U. S. 310.

In the Brasfield case the proper relation between the court and jury was involved. By directing certain questions to the jury after submission of the case the trial court committed reversible error. The exception was not particularized, but it was there held that under the extraordinary circumstances involved this court was not precluded from correcting the error.

In the N. Y. Central case, *supra*, counsel for plaintiff made a bitter attack on counsel for defendant which was calculated to arouse prejudice in the minds of the jury. Defense counsel did not particularize exceptions, but it was held that this court was not precluded from correcting the error. The Court said: "the public interest requires that litigation be fairly and impartially conducted, and it is the duty of Courts to protect suitors in their rights to a verdict uninfluenced by the appeals of counsel to passion and prejudice."

It is significant that in the cases cited no waiver of rights was chargeable to the complaining party. There was, either error patent on the record, an attempt to save

exceptions, but in the case at bar the testimony was not objected to when offered, nor was there an attempt of any kind to challenge it upon the ground that it tended to change and extend the terms of the contract, which clearly amounted to a waiver of the right.

Counsel for respondent moved to strike the testimony upon the specific ground that it is not responsive to the issues raised by the pleadings, but the Court of Appeals passed the specific objection unnoticed and held the testimony incompetent upon the new and different ground that it tended to change and extend the terms of the written contract. This amounted to force the respondent into a position with reference to the admissibility of the testimony which it had shown no inclination to take, or disposition to defend, and injected into the case an issue which the trial court was given no opportunity to rule upon.

The respondent, even if disposed so to do, could not object to the testimony upon one specific ground in the trial court and challenge it, for the first time, upon a new and different ground, in the Court of Appeals.

Lehman v. *Burnes National Bank*, 20 Fed. (2nd) 897.

Lederer v. *Real Estate Title Co.*, 273 Fed. 933.

The Court of Appeals evidently overlooked the fact that the testimony of Mrs. Lyon developed on direct examination was not objected to, and that Counsel for respondent, on cross-examination, developed substantially the same facts, and even went further to show the oral conversations between insured and the local treasurer,

therefore the Court of Appeals is in the attitude of reversing the judgment for admissibility of testimony which counsel for respondent brought into the record.

This case does not fall within the rule laid down in cases like *Watkins Salt Co.* v. *Mulkey*, 225 Fed. 739. In that case oral evidence tending to prove an oral contract was admitted without objection, but at the close of plaintiff's evidence defendant moved for directed verdict upon two grounds; First, that the oral agreement was merged in the written contract sued upon and, Second, that the oral agreement violated the statute of frauds. The Court held that a sufficient objection had been made, but in that case opportunity was afforded for the trial court to rule on the objection upon both grounds, but in this case the testimony was not challenged in any manner, either in the trial court or in the appeals court, upon the ground that it tended to change and extend the terms of the written contract.

Where the terms or words used in a policy of insurance are ambiguous parol evidence is admissible to explain them.

Home Ins. Co. v. *Baltimore Warehouse Co.*, 93 U. S. 527.

Continental Life Ins. Co. v. *Chamberlain*, 132 U. S. 304.

There is sufficient ambiguity in the provisions of the policy relating to premium payments to justify admission of parol evidence to explain them.

Delivery of the policy containing provision for payment in advance raises a rebuttable presumption that the

first premium was paid, but payment is always a question of fact that may be shown by parol evidence.

48 Corpus Juris 687.

Keen v. *Aetna*, 213 Fed. 893.

Lasker v. *Morris*, 131 Ark. 576.

Lay v. *Gaines*, 130 Ark. 167.

Kilpatrick v. *Rowan*, 119 Ark. 175.

J. H. McGill v. *Lane*, 90 Ark. 426.

Morton v. *Morton*, 82 Ark. 492.

Vaughn v. *Taylor*, 18 Ark. 65.

Pate v. *Johnson*, 15 Ark. 375.

SPECIFICATION OF ERROR NO. 2

An admitted agent may be dealt with as a general agent in matters within the apparent scope of the agency, and the principal is bound by the acts of the agent, even though his acts are in excess of the authority given.

Oak Leaf Mill Co. v. *Cooper*, 103 Ark. 79.

Queen of Ark. Ins. Co. v. *Malone*, 111 Ark. 229.

Concordia Fire Inc. Co. v. *Mitchell*, 122 Ark. 357.

Hal H. Peel & Co. v. *Hawkins*, 175 Ark. 806.

Stipcich v. *Insurance Co.*, 277 U. S. 311.

Payment of premium to a general agent of the company authorized to transact the company's business and without notice of any limitation of his authority to receive payment is sufficient to bind the company.

32 C. J., p. 1199.

Southern Life Ins. Co. v. *McLain*, 96 U. S. 84.

McNeily v. *Continental Life Ins. Co.*, 66 N. Y. 23.

Mowry v. *Home Life Ins. Co.*, 9 R. I. 346.

Payment to a general agent is sufficient whether in conformity with the terms of the policy or not.

Lasch v. *N. Y. Life Ins. Co.*, 153 N. Y. S. 898.

The agency clause in a policy of insurance must be liberally construed.

Supreme Lodge K. of P. v. *Withers*, 177 U. S. 260.

In the case of *Peel & Co.* v. *Hawkins*, *supra*, the agent, acting without authority, agreed that the Insurance Company would make insured a loan out of which insured could pay his promissory note given for the first premium. That was a matter pertaining to the collection of premiums. The Company was also engaged in the business of making loans. The agent was authorized to collect premiums and under the law as declared by the Supreme Court of Arkansas he was a general agent for all purposes within the scope of his agency, and could bind his company notwithstanding he acted in excess of authority.

In the case at bar the agent was given the title of local treasurer and authorized to collect premiums. His actions here involved were related to the collection of premiums, and for that purpose he was a general agent, and had apparent authority to waive requirement of strict performance concerning time and manner of payment.

Respondent's local treasurer was not an ordinary soliciting agent. He had authority to solicit insurance, accept applications, collect initial premiums, deliver policies, collect renewal premiums and counters.n receipts, in fact by giving him the title of local treasurer the respondent held him out, not only as a general agent, but as an agent having an official character with apparent authority to transact the company's business generally at Rogers, Arkansas.

Knowledge of limitation on agent's authority must be shown to be binding on insured.

N. Y. Life Ins. Co. v. *Fletcher*, 117 U. S. 519.

In the case at bar the insured had no actual or constructive knowledge of any limitation on the authority of the local treasurer. None was expressed in the application and the limitation expressed in the policy came too late.

Provisions in a policy limiting the agent's authority are not binding on insured during the preliminary negotiations.

Peoples Fire Ins. Co. v. *Goyne*, 79 Ark. 315.

Hartford Fire Ins. Co. v. *Wilson*, 187 U. S. 467.

Mutual Benefit Life Ins. Co. v. *Robinson*, 58 Fed. 723.

SPECIFICATION OF ERROR No. 3

The Court of Appeals held that the contract provides for insurance on the quarterly payment plan, and therefore any change in the plan of payment would amount to a change and extension of the terms of the contract, and that

the local treasurer was without authority to bind the company with such a change.

It is obvious that in reaching that conclusion the Court failed to give due effect to the well-settled rule that requires a construction of the terms of the policy most liberally in favor of the insured, and that in case of conflict or ambiguity a construction will not be adopted that will defeat recovery if it is susceptible of a meaning that will permit one.

Industrial Mutual Ins. Co. v. *Hawkins*, 94 Ark. 419.

Hastings Industrial Co. v. *Copeland*, 114 Ark. 415.

Irwin v. *Nichols*, 87 Ark. 97.

United Order of Good Samaritans v. *Grigsby*, 180 Ark. 610.

National Bank v. *Ins. Co.*, 95 U. S. 673.

During the preliminary negotiations insured learned that no days of grace were allowed for payment of premiums. The local treasurer suggested a plan of payment so as to keep the premiums paid a year in advance. That plan was adopted and the respondent ratified the oral agreement by issuing the policy so as to reflect it. The policy in plain terms provides for payment of the first year's premium in the sum of $74 in advance, and the quarterly premium payments were to begin on April 1st, 1927, so as to keep the premiums paid a year in advance. If the first year's premium was to be paid in equal quarterly installments as held by the Court of Appeals, then the payments during the first year would necessarily have been in the sum of $18.50 instead of $16. It is plainly evident that this

feature of the evidence was entirely overlooked by that Court.

In the application there is a question and answer indicating that the premiums were to be $16 quarterly, but that relates to subsequent annual premiums to be paid in quarterly installments and not to the premium for the first year. Provisions for the payment of renewal premiums are not applicable to the payment of the first premium.

McMaster v. *New York Life Ins. Co.*, 183 U. S. 25.

It may be conceded that the application and policy considered together form the contract of insurance, but where there is conflict the policy provisions prevail and control.

Mouler v. *American Life Ins. Co.*, 111 U. S. 335.

When the evidence is carefully considered and the policy terms construed liberally in favor of recovery, it cannot be said that the local treasurer exceeded his apparent authority, in fact there is a total absence of reason for holding that he exceeded his actual authority, but if he did that his action was fully ratified by respondent.

The facts here are quite different to the facts in the case of *Sadler* v. *Fireman Fund Ins. Co.*, 185 Ark. 480. That case involved the authority of a soliciting agent to agree upon terms to be inserted in the policy, and it was held that a soliciting agent did not have authority to make insurance contracts binding on the principal. The Court in that case simply held in effect that the making of a contract of insurance is not within the apparent scope of agency of a mere soliciting agent.

In clause (C) on page 3 of the policy (R. 25) appears the following provision:

> "If any such dues be unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the day such payment is due."

This is the only provision in the policy attempting to fix the time and place of payment of premiums. Insured paid the premiums to the local treasurer at Rogers, Arkansas, continuously for more than seven years. The majority of the payments were made on the due date, but several were paid prior to, and some after the date payment was due, but none were paid in the manner required by the terms of the policy. The local treasurer gave express consent to payment of premiums out of time. Every premium tendered, excepting the last one, was accepted by the association without objection. This was clearly a waiver of the policy requirement as to time and place of premium payments, indeed, it was a complete abandonment of it.

As shown by authorities herein above cited the local treasurer was a general agent for all purposes relating to collection of premiums and therefore had apparent authority to waive strict compliance with the requirements concerning premium payments, notwithstanding the provision in the policy tending to limit his authority.

Having established the agency with authority to collect the premiums, and maintained the agency for that purpose for a period of more than seven years, a termination of it without notice was not binding on the insured.

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Burlington Ins. Co. v. *Threlkeld*, 60 Ark. 539.

Southern Life Ins. Co. v. *McCain*, 96 U. S. 84.

State Life Ins. Co. v. *Murray*, 159 Fed. 408.

The termination of the agency without notice was the sole cause of insured's delay in paying the premium which came due on July 1, 1934. Regardless of the fact that the premiums were paid a year in advance the terms of the policy required payment of a premium at the beginning of each quarter. Insured made an effort in good faith to make the payment when due.

SPECIFICATION OF ERROR No. 4

Where two clauses of a contract of insurance conflict and are inconsistent, they must be construed so as to give effect to the true intent of the parties, as collected from the whole instrument. If one clause is at variance with another the one contributing most essentially to the contract will be entitled to more consideration than that which contributes less. The clause which essentially requires something to be done to effect the general purpose of the contract itself is entitled to greater consideration than the other.

Fidelity & Casualty Co. v. *Meyer*, 106 Ark. 91.

United Order of Good Samaritans v. *Grigsby*, 180 Ark. 610.

Industrial Mutual Ins. Co. v. *Hawkins*, 94 Ark. 419.

Life & Casualty Ins. Co. of Tenn. v. *Ford*, 172 Ark. 1098.

Peifer v. *Mo. State Life Ins. Co.*, 174 Ark. 783.

Hastings Industrial Co. v. *Copeland*, 114 Ark. 415.

Irwin v. *Nichols*, 87 Ark. 97.

National Bank v. *Ins. Co.*, 95 U. S. 673.

Mutual Ins. Co. v. *Hemi Co.*, 263 U. S. 167.

Great Lakes Corp. v. *Interstate S. S. Co.*, 301 U. S. 646.

The provisions of clauses (C) and (D) on page 3 of the policy (R. 25) if construed separately and independently of other provisions appear to authorize arbitrary termination of the contract by the Association at any premium paying date. If so construed, they are in conflict, not only with part "C" on page one of the policy which provides for annual increase of benefits and the twenty-year privilege, but also with the general import, purpose and intent of the contract.

Where a policy contains provisions that impress it with the essential character of lifetime insurance as does the one here involved; offers attractive rewards for continuous performance; enables insured, by continuous performance, to build up a one hundred per cent increase of benefits which after payment of twenty annual premiums he may carry for only $4 annually; provides for additional payment of a sum equal to all premiums paid with compound interest, an extraordinary saving and investment feature, all of which is lost if the policy is terminated; a receipt is issued for each premium payment, reciting not that the policy will terminate, or have to be renewed, at the next premium date, but that on that date another premium payment will be due, reason and justice would seem to compel a construction allowing such provisions to prevail over a conflicting provision that would under strict

construction authorize an arbitrary termination of the contract, and thus deprive insured of his earned benefits.

Under the rule that obtains in Arkansas every policy of insurance is to be construed liberally in favor of insured and as the language employed is that of the insurer a construction will not be adopted which will defeat recovery, if it is susceptible of a meaning that will permit one.

In the case of *Industrial Mutual Ins. Co.* v. *Hawkins*, above cited, the policy contained the following provision:

> "If the insured receives an injury which shall independently of all other causes, immediately and wholly disable and prevent the insured from the prosecution of any and every kind of business for a period of not more than one week * * *."

The court adhering to the well-established rule, that the terms of the policy must be construed liberally in favor of the insured, and so as not to defeat the purpose of the contract, held that the words used mean, "any and every kind of work pertaining to his occupation or within the scope of his ability."

The insured was an uneducated day laborer and incapable of performing any kind of work or business except day labor. If the policy had been strictly construed recovery would have been defeated because, notwithstanding insured's injury incapacitated him from performing work as a day laborer, he could, if qualified, have engaged in a business or occupation which did not require physical labor.

In the case of *United Order of Good Samaritans* v. *Grigsby, supra*, there were conflicting provisions in the contract involved. One provided that if dues are not paid

by the tenth day of each month the insured shall be automatically suspended, and the insurer shall not be liable on the contract, but in another provision the dues are made payable in advance, on or before the first day of the month with ten days grace, which made dues fall due on or before the eleventh day of the month. The dues were paid on the eleventh day of the month, but the insurer contended that inasmuch as same were not paid on or before the tenth day of the month the insured was automatically suspended. The court adopted the construction most favorable to insured and sustained the right of recovery.

In the case of *Life and Casualty Insurance Company of Tennessee* above cited, the policy provided for indemnity for loss of one limb in the sum of $500 and for the loss of two limbs the sum of $1,000. The policy contained the following provision limiting liability:

> "No indemnity will be paid as result of, or for injuries caused by other means or under other conditions than those set forth above nor where death, or loss of members, or eye sight occur within thirty days from the date of accident."

The court giving to the policy a construction most strongly against the insurer held that by use of the word "members" the limitation applies only in case of loss of more than one member and therefore did not apply in that case, because the insured suffered loss of only one member.

In the very recent case of *Great Lakes Corporation* v. *Interstate Steamship Company, supra*, it was said by this Court:

"If ambiguities are raised by other clauses they must be resolved so as still to give effect to the dominant purpose which the policy clearly reveals."

There can be no reasonable doubt that both the Association and the insured understood and intended that the policy here involved should be a contract of lifetime insurance. It is plainly contemplated that premiums will be continuously paid at the stipulated rate until twenty annual premiums have been paid, then the insurance in the sum of $4,000 which includes the annual increase of death benefits, may be carried for the nominal sum of four dollars a year.

The Court's especial attention is directed to section three of the STANDARD PROVISIONS on page two of the policy which reads as follows:

> "If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of the premium by the association or any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance."

When properly construed this is not a policy of term insurance, no definite time is fixed for termination of the policy. It is true that clause (d) on page three of the policy provides that the term of the policy begins at twelve o'clock noon on the date of issue, and ends at twelve o'clock noon on the date any renewal is due, but when read in connection with other provisions of the policy which characterize the contract as one of lifetime insurance that clause

early means that the policy will terminate only if the re-
ewal premium is not paid.

A policy of life insurance is ordinarily a contract for
fe and not one from year to year or only during the period
r which a premium is paid.

Burnet v. *Wells*, 289 U. S. 679.

N. Y. L. Ins. Co. v. *Statham*, 93 U. S. 30.

This policy is unlike the one involved in the case of
osenplanter v. *Provident Savings Life Ins., Asso.*, 96 Fed.
1, in that case, while the policy contained some provi-
ons similar to provisions in the policy here involved the
stinguishing provision that makes it a term policy reads
follows:

> "In consideration of the premium paid and stipu-
> lated to be paid the insurance society agrees to pay the
> beneficiary the sum of the insurance Provided such
> death shall occur before twelve o'clock on the first
> day of April, 1890."

The policy involved here is clearly a contract of life-
ne insurance. That was obviously the understanding of
th the association and the insured. That such was the
derstanding of the association is demonstrated by the
ct that each receipt issued for premium payment recited,
t that the policy would terminate, or have to be re-
wed, at the next premium paying date, but on that date
nother quarterly payment is due, and that such payment
eps the policy in continuous effect.

The continuous issuance of receipts containing such
cital was positive assurance to the insured that by punc-
al payment of the premiums, the policy would be kept in

continuous effect, indeed, it was an implied agreement to that effect.

To construe it otherwise is to give approval to deception and to make the contract a snare by which the association may entrap a policyholder and beguile him into paying the premiums, while a desirable risk for the association, believing he will receive the increased benefits promised, but only to be disappointed by having his contract arbitrarily canceled out when the association desires to appropriate the accumulated benefits earned and avoid further liability on the contract.

It is a bad time for the Association to insist on a technical and strained construction of the ambiguous policy terms after the insured has paid the permiums punctually over a period of more than seven years and died believing he had made provision for the protection of his dependent family.

The courts will not construe an insurance contract so as to give effect to deception.

Phoenix Ins. Co. v. *Slaughter*, 12 Wallace 404—20 Law ed. 444.

The law abhors a forfeiture, therefore the courts are prompt to seize hold of any circumstances that indicate an election to waive a forfeiture. Any agreement, declaration or course of action on the part of an insurance company which leads an insured person honestly to believe that by conformity thereto a forfeiture of his policy will not be incurred, and followed by due conformity on his part, will and ought to estop the company from insisting upon a for-

feiture, though it might be claimed on the strict letter of the contract.

In construing the policy the court will consider every provision, phrase and word in connection with each other and where there is no material conflict in the various clauses of inconsistent, contradictory or ambiguous terms, phrases and words used, effect must be given to each according to its ordinary and generally accepted meaning, but construction always means ascertainment of the real intent of the parties.

Grammatical construction must yield to that construction of provisions, words and phrases that tend to reflect the true intent of the contracting parties.

Punctuation, or the lack of it, is often a material factor in determining the true meaning of the various clauses in a contract, especially when there is apparent conflict.

In construing a contract it is permissible to transpose words if to do so will clarify the meaning of them and reflect the true meaning intended by the parties.

13 C. J., Pages 520 to 536, Sections 481-495, Incl.

The special and extraordinary benefits provided were obviously intended as an inducement to continuation of the contractual relationship. The court will not give to the contract a strained construction that will enable the defendant to arbitrarily terminate it, and thus deprive the beneficary of the benefits earned.

In the last paragraph of clause (c) on page three of the policy the following provision appears:

"The acceptance of any premium on this policy shall be optional with the association and should the premium provided for herein be insufficient to meet the requirements of this policy, the association may call for the difference as required."

What is the true meaning of these provisions as collected from the whole contract? It seems absurd to argue that the company and the insured agreed and intended that any provision in this policy, offering the attractive earning features that it does, should mean that the company could arbitrarily cancel it at any time it might desire to avoid payment of the increased benefits earned, and its obligation to carry the liability at the reduced rate of premium.

It is here insisted that the true meaning of the first provision of clause "C" is that, if the premium is not paid on the day it is due, the policy will lapse and insured will forfeit his insurance, but if the premium is paid or tendered the policy will continue in force. The second provision, when read in connection with other provisions simply means that inasmuch as the defendant company is a mutual association, and each policyholder participates in the earnings of the association on the basis of graduated increase of benefits accruing only to those who continue their policies in force, and that its ability to pay such benefits is dependent upon maintenance of adequate premium rates, it may accept the premium tendered, if insuffcient, and call for any balance that may be assessed against the policyholder.

By application of the above stated recognized rules of construction, the words in the second provision of clause

"C" may be transposed so as to express the true intent of the contracting parties, and by transposition it should be made to read as follows:

> "Should the premium provided for herein be insufficient to meet the requirements of this policy, the acceptance of any premium shall be optional with the association, and the association may call for the difference as required."

Use of the co-ordinating conjunctive word "and", which follows the word "association" and precedes the word "should" in the second provision of clause "C" makes it a single declarative sentence and necessarily gives to the proviso the meaning contended for here. If the meaning contended for by Respondent had been intended, a period punctuation mark would have been used instead of the conjunction as was done in the provision of the policy involved in the case of *Yett* v. *Orgeon Casualty Co.*, 172 Pac. 486, which will be cited by respondent. That case is not controlling here, because the provision there differs materially, and there was no effort made to pay the premium when due, and no waiver or estoppel relied upon.

The provision here under test is a simple reservation of the right to demand of its member's payment of an adequate premium rate when an increase of such premiums appears necessary to enable it to meet benefit liabilities, and to provide that acceptance of a premium does not estop or debar it from demanding additional premium payments when necessary. Any other construction of the provision will tend to defeat the real intent of the parties to the contract and enable the defendant company to arbitrarily deprive its policyholders of the increased benefits.

As stated in a former brief filed herein:

Under the construction given this policy by the Appeals Court it was permissible for respondent to receive premium payments for the full twenty-year period, then discontinue the contract to avoid carrying the liability at the reduced premium rate. Such a construction is condemned by its own injustice. The conclusion that this policy was intended by the parties to be lifetime insurance is inescapable and when construed so as to effectuate that intent it provides for termination by respondent only for breach by the insured.

The respondent is a mutual association. Notice of the annual meeting is printed in clause "f" of general provisions on page thirty of the policy. Dividends are not distributed direct to the policyholders, but it is contemplated that they will participate in the earnings on basis of annual increase of benefits and return of premiums with interest added.

It may be fairly assumed that premium rates are fixed to provide for payment of the increase of benefits. By payment of the initial premium insured's rights are limited to protection in the sum of $2,000 for the first year but by payment of renewal premiums he acquired a vested right to participate in the earnings of the Association on basis of increased benefits. To hold otherwise is to nullify the contractual obligation of respondent to give effect to the provisions for rights and benefits to be earned by continuous payment of the premiums.

SPECIFICATION OF ERROR No. 5

The trial court did not err in directing a verdict for the petitioner.

It is the rule of universal application that where the testimony is undisputed and from it all reasonable minds must draw the same conclusion of fact, it is the duty of the court to declare as a matter of law the conclusion to be reached, but where there is substantial evidence to support the verdict the question must be submitted to the jury.

Smith v. *McEachein*, 186 Ark. 1134.

The testimony of the plaintiff that the first year's premium in the sum of $74 was paid in advance is undisputed. Of course, she is an interested witness, but if it be conceded that the rule in *Blankenship* v. *Modglin*, 177 Ark. 38, holding that the positive testimony of an interested witness standing alone will not be treated as undisputed, that rule is not controlling here for the reason that Mrs. Lyon's testimony is not standing alone. It is corroborated and made conclusive by the following facts and circumstances:

1st The policy provides in plain terms that the premium for the first year in the sum of $74 is to be paid in advance.

2nd The premium for the first year is not required to be paid in quarterly installments. The provision for quarterly payments applies only to subsequent premium payments made to keep the policy in continuous effect.

3rd If the premium for the first year was required to be, or was, paid in quarterly installments, the

amount would necessarily have been $18.50 per quarter instead of $16.

4th The delivery of the policy with the provision for the payment of the first year's premium in advance is *prima facie* evidence that the first premium was paid.

5th The recital in the policy that it is issued in consideration of the statements made in the application and the payment of the premium of $74 for the first year in advance, is to all intents and purposes an acknowledgment of the payment of that amount.

In testing whether or not there is any substantial evidence in a given case the evidence and all reasonable inferences deducible there from should be viewed in the light most favorable to the party against whom the verdict is directed, and if there is any conflict in the evidence or where the evidence is not in dispute, but is in such a state that fair-minded men might draw different conclusions therefrom it is error to direct a verdict.

Smith v. *McEachein, supra.*

In the state of Arkansas the scintilla rule is applied.

Home Life Ins. Co. v. *Miller,* 182 Ark. 901.

Inasmuch as the action of a court in directing a verdict is procedural it is here assumed that the *lex fori* applies in the federal courts.

The scintilla rule does not apply in federal courts. It has been disapproved.

Elliott v. *C. M. & St. P. R. Co.*, 150 U. S. 245.

Small v. *Lamborn Co.*, 267 U. S. 254.

In *Small* v. *Lamborn* last above cited this court laid down the rule that governs in the matter of directing verdict as follows:

> "The rule for testing the direction of a verdict is that where the evidence is undisputed or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of sound judicial disgression, a verdict may and should be directed for the other party."

And continuing the court went on to say:

> "The view that a scintilla or modicum of conflicting evidence irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury has met with express disapproval in this jurisdiction as in many others."

If the trial court had submitted this case to the jury the only fact or circumstance respondent could have relied upon is that petitioner did not exhibit a receipt showing payment for the first premium, and in urging that fact it would have been confronted with the positive and undisputed testimony of the plaintiff, brought out by counsel for respondent on cross-examination, that the reason why she did not have a receipt was because Mr. Cottingham, respondent's authorized local treasurer, advised insured that the policy itself is a receipt for the first premium payment.

Delivery of the policy containing provision requiring premium for the first year to be paid in advance is *prima facie* evidence that the premium was paid as required.

32 C. J., p. 1204, Sec. 335.

Mutual Reserve L. Ins. Assoc. v. *Heidel*, 161 Fed. 535.

Mass. Benefit L. Ins. Co. v. *Sibley*, 158 Ill. 411.

Globe Mutual L. Ins. Co. v. *Meyer*, 118 Ill. A. 155.

Union Life Ins. Co. v. *Parker*, 66 Neb. 395.

It appears that the court of appeals erroneously resolved every possible doubt against Petitioner's right of recovery and indulged every presumption against correctness of the judgment of the trial court.

It is here insisted that the judgment of the trial court is correct, and that the judgment of the U. S. District Court should be affirmed, and that all other appropriate relief should be awarded to the petitioner.

Respectfully submitted,

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